IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No. 92 of 2004

Sedco Forex International Drilling Inc.
as agent of its employee Mr. Nick Divkovic,
a company incorporated in the Republic of Panama
having its registered office at No. 8,
Acquitino de la Guardia Street,
City of Panama,
Republic of Panama,
Present address C/o A.F. Ferguson & Co.,
Maker Towers, Cuffe Parade, Mumbai …Appellant

Versus

1. The Commissioner of Income Tax,
Dehradun, having office at Subhash Road,
Dehradun 248001.

2. The Assistant Commissioner of Income Tax,
Special Range, Dehradun
having office at Subhash Road,
Dehradun 248001. ….Respondents

Mr. Arvind Vashishth, Advocate of the appellant.
Mr. S.K. Posti, Advocate for the respondents.

Coram: Hon. Cyriac Joseph, C. J.
Hon. J.C.S. Rawat, J.

JUDGMENT

CYRIAC JOSEPH, C.J. (Oral)

1. This appeal is filed against the order dated 30.01.2004 passed by the Income Tax Appellate Tribunal, Delhi Bench 'F', New Delhi in I. T. A. No. 219/Del/1999. The appellant is the assessee. The dispute relates to the Assessment Year 1995-96.

2. The substantial questions of law raised in the appeal are as under:

> "(i) What is the true construction of Section 9(1)(ii) of the Act read with Explanation thereto?
> (ii) Whether on the facts and circumstances of the case, the Tribunal ought to have held that under Section 9(1)(ii) of the Act off period salary can only be made chargeable to tax provided certain conditions are fulfilled such as it is preceded / succeeded by service

rendered in India and forms part of service contract of employment?

(iii) Whether on the facts and circumstances of the case, the Tribunal ought to have held that in case of a non-resident the salary earned for services not rendered in India cannot be chargeable to tax under Section 9(1)(ii) of the Act?

(iv) Whether on the facts and circumstances of the case, the Tribunal ought to have held that the decision of this Hon'ble Court is per incurium as it fails to take into account that the Explanation to Section 9(1)(ii) is inserted w.e.f. 01.04.2000 which is prospective thus the decision to tax off period salary in the assessment years 1992-93 and 1993-94 is contrary to the legislative provisions and intent?

(v) Whether on the facts and circumstances of the case the Tribunal ought to have held that it is well settled that only amendment made in the Act which have come into force in the first day of April on any financial year must apply to that assessment year and an amendment which comes into force first day of April of assessment year 2001 cannot apply to assessment years 1992-93 and 1993-94?

(vi) Whether on the facts and circumstances of the case, the Tribunal ought to have held that the circular No. 779 of the Central Board of Direct Taxes treated 14th September, 1999 which is binding on the Revenue cannot be ignored while interpreting Section 9(1)(ii) read with Explanation thereupon of the Act for the assessment year?

(vii) Whether on facts and circumstances of the case, the Tribunal ought to have held that the decision of this Hon'ble Court need not be followed as it is contrary to the decision of the Supreme Court in various cases such as interalia Karimtharuvi Tea Estates Ltd. Vs State of Kerala [60 ITR 262 (SC)]?

(viii) Whether "off period salary" represents rest period salary when employees are required to make themselves available for the training, emergency duty etc. as set out in the employment contract?"

3. Though the appellant has raised different questions of law as quoted above, in substance there is only one question of law, i. e., whether the Tribunal erred in holding that "off period salary' paid to the assessee was taxable under section 9 (1)(ii) of the Income Tax Act, 1961. In Commissioner of Income Tax- and another Vs. Sedco Forex International Drilling Co. Ltd. and connected cases reported in (2003) 264 ITR 320, a Division Bench of this Court held that the payment of salary for "off period" was income earned in India, i.e., for services rendered in India

under Section 9(1)(ii) of the Income Tax Act, 1961 and that “off period salary” was taxable under section 9(1)(ii) of the Income Tax Act, 1961.

4. Following the above mentioned judgment of a Division Bench of this Court, the appeal is dismissed.

(J.C.S. Rawat, J.)
05.10.2005

(Cyriac Joseph, C.J.)
05.10.2005

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